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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 84-2286, 85-1171

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NATURAL GAS PIPLINE COMPANY OF AMERICA; THE PEOPLES GAS LIGHT and COKE COMPANY, and NORTH SHORE GAS COMPANY; PUBLIC SERVICE COMPANY OF COLORADO, WESTERN GAS SUPPLY COMPANY and CHEYENNE LIGHT, FUEL AND POWER COMPANY; THE CITY and COUNTY OF DENVER, COLORADO; KN ENERGY, INC.; MIGC, INC.; and the CITY OF COLORADO SPRINGS, COLORADO,
Intervenors.

May 19, 1986

Before BARRETT, McKAY and TACHA, Circuit Judges.

TACHA, Circuit Judge.

This case consolidates appeals from two orders of the Federal Energy Regulatory Commission (Commission) issued in the course of a rate increase proceeding under § 4 of the Natural Gas Act. This court has jurisdiction

to review these orders pursuant to 15 U.S.C. § 717r. The questions presented are whether the Commission acted within its authority in (1) ordering retroactive modification of a contract provision that the company seeking the rate increase did not propose to change, and (2) rejecting the company's compliance filing. We affirm the orders of the Commission.

This case has a long and complicated procedural history which will be outlined briefly. Colorado Interstate Gas Company (CIG) is engaged in the interstate sale of natural gas. Pursuant to a series of service agreements, Natural Gas Pipeline Company of America (Natural) has purchased gas from CIG since 1955. Currently Natural purchases gas from CIG at two different rates, F-1 and H-1. Each rate has two components, a commodity charge and a demand charge. The commodity charge includes all variable costs (mainly the cost of the gas) plus certain fixed costs. The demand charge includes all fixed costs not allocated to the commodity charge. The F-1 rate covers field sales; the H-1 rate covers sales from CIG's mainline facility. The H-1 rate is higher than the F-1 rate because it includes fixed costs of storage and transmission facilities.

The service agreement existing between CIG and Natural at the start of this regulatory action, like the previous service agreements between the companies, contains a minimum commodity bill. This minimum bill provision requires Natural to take or pay for 90% of the volume of gas to which it is contractually entitled. According to the minimum bill, all deficiency charges, whether arising under the F-1 or the H-1 rate schedules, are assessed at the lower F-1 rate. Prior to 1983, the pay provision of the minimum bill had never been triggered.

In March 1982, CIG initiated a general rate increase proceeding under § 4 of the Natural Gas Act, 15 U.S.C. § 717c. The rate increase neither altered nor mentioned the minimum bill provision in the service agreement be-

tween Natural and CIG. Natural and several other gas companies intervened in the § 4 proceeding. Pursuant to 15 U.S.C. § 717c, the Commission suspended the rate increase until September 29, 1982, after which CIG's increased rates became effective subject to refund.[1]

CIG filed a proposed stipulation and agreement which the intervenors, with the exception of Natural, accepted. Natural opposed the settlement because it failed to modify the minimum bill, a provision Natural contended was unreasonable and discriminatory. The Administrative Law Judge (ALJ) issued an order severing the minimum bill issue and certifying the remaining portion of CIG's settlement to the Commission.[2] The ALJ specifically noted in his order that rates charged Natural under the minimum were subject to refund.

The Commission approved the settlement proposal as certified by the ALJ, finding that the settlement reasonably resolved the issues with which it was concerned.[3] The Commission noted that the minimum bill issue remained unresolved.

The minimum bill issue then proceeded to a hearing before the ALJ. The ALJ concluded that the minimum bill as constituted was not just and reasonable because the provision required Natural to pay the variable costs of gas that it did not take.[4] He replaced the minimum bill with a demand charge designed to enable CIG to recover all fixed costs allocable to Natural. The ALJ determined that the demand charge should be given prospective effect. The Commission concurred in the ALJ's finding that the minimum bill imposed by CIG was not

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[1] 19 F.E.R.C. ¶ 61,071 (issued April 28, 1982).

[2] 22 F.E.R.C. ¶ 63,040 (issued January 28, 1983).

[3] 22 F.E.R.C. ¶ 61,330 (issued March 10, 1983).

[4] 25 F.E.R.C. ¶ 63,012 (issued October 18, 1983).

just and reasonable.[5] The Commission, however, permitted CIG to retain the minimum bill but ordered CIG to modify the provision so as to preclude the collection of variable costs. The Commission made this modification retroactive to the effective date of CIG's rate increase.[6] CIG sought rehearing which the Commission denied.[7]

CIG's proposed revision of the minimum bill was rejected by the Commission as not in compliance with the modification order.[8] The Commission denied CIG's request for a rehearing.[9] This appeal followed.

During the course of the § 4 proceeding, CIG was also involved in a § 7 proceeding. In the § 7 proceeding, CIG sought and was issued a certificate of public convenience and necessity authorizing CIG to increase its sales to Natural.[10] Upon issuance of the certificate, CIG and Natural entered into a new service agreement which was accepted by the Commission.[11]

The questions on appeal are whether the Commission acted within its authority in (1) ordering modification of the minimum commodity bill in the service agreement between CIG and Natural retroactive to the effective date of CIG's 1982 rate increase, and (2) rejecting CIG's revised minimum commodity bill compliance filing.

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[5] 27 F.E.R.C. ¶ 61,315 (issued May 25, 1984).

[6] During the pendency of the § 4 proceedings, Natural decreased its purchase of gas below 90% of its entitlement, triggering the minimum bill pay provision. By ordering retroactive, rather than prospective, modification of the minimum bill, the Commission precluded CIG from collecting approximately $20 million in deficiency charges Natural incurred prior to the Commission's modification order.

[7] 28 F.E.R.C. ¶ 61,083 (issued July 23, 1984).

[8] 29 F.E.R.C. ¶ 61,124 (issued October 31, 1984).

[9] 30 F.E.R.C. ¶ 61,112 (issued February 1, 1985).

[10] 19 F.E.R.C. ¶ 61,283 (issued June 24, 1982).

[11] 21 F.E.R.C. ¶ 62,263 (issued November 1, 1982).

I.

The first question we address is whether the Commission acted within its authority in giving retroactive effect to the minimum bill revision.

A.

CIG concedes that the minimum bill was unjust and unreasonable and thus subject to prospective modification under § 5 of the Natural Gas Act. The question raised in this case is whether the Commission had the authority to order retroactive modification under § 4. The primary purpose of the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, is to protect consumers from exploitation at the hands of natural gas companies, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610, 64 S.Ct. 281, 291, 88 L.Ed. 333 (1944). This purpose is achieved through the Commission's plenary review of the contracts and rate schedules established by such companies. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784, 88 S.Ct. 1344, 1368, 20 L.Ed.2d 312 (1968); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 341, 76 S.Ct. 373, 379 100 L.Ed. 373 (1956). The Commission conducts this plenary review pursuant to proceedings initiated under §§ 4 and 5 of the Natural Gas Act. In proceedings under either section, the Commission determines whether the rates fixed by natural gas companies are just and reasonable, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. at 341, 76 S. Ct. at 379.

Though the ultimate issue is the same under either section, the Commission's power in reviewing a company's rates and the means of initiating Commission review differ under the two sections. A § 5 rate proceeding, in which the Commission reviews previously established rates of a natural gas company, is initiated upon the Commission's own motion or upon the complaint of third parties. The moving or complaining party has the burden of proving the established rates are unjust and unreason-

able. If the moving party successfully meets that burden, the Commission sets the rates the natural gas company may charge thereafter. Only prospective relief from unjust rates is available in a § 5 proceeding. 15 U.S.C. § 717d(a); *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 70 S.Ct. 1246, 1253, 3 L.Ed.2d 1312 (1959).

The filing of new rates by a natural gas company triggers Commission review under § 4. In a § 4 proceeding, the gas company has the burden of justifying its newly filed rates. If the gas company fails to show that its increased rates are just and reasonable, the Commission modifies the rates. This modification may be made retroactive through the Commission's refund power to the date the increased rates became effective. 15 U.S.C. § 717c(e); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. at 341, 76 S.Ct. at 379.

Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure that all parts of the structure—both old and new—operate together to produce just and reasonable rates. *See City of Batavia v. Federal Energy Regulatory Comm'n*, 672 F.2d 64, 75-77 (D.C.Cir.1982) (dealing with a similar section of the Federal Power Act, 16 U.S.C. § 824d[e]). By filing the rate increase, a gas company assumes the risk of having to justify its entire rate structure, *see Federal Power Comm'n v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152, 83 S.Ct. 211, 215, 9 L.Ed.2d 199 (1962), including integral provisions of that structure which the company does not propose to change, *Florida Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 741 F.2d 1307, 1311 (11th Cir. 1984); *North Penn Gas Co. v. Federal Energy Regulatory Comm'n*, 707 F.2d 763, 769 (3d Cir.1983); *City of Batavia v. Federal Energy Regulatory Comm'n*, 672 F.2d

at 75-77; *Laclede Gas Co. v. Federal Energy Regulatory Comm'n*, 670 F.2d 38, 41-42 (5th Cir.1982). A provision which serves as a charging mechanism is considered an integral part of a rate increase and a gas company's rate structure. *Cf. Laclede Gas Co. v. Federal Energy Regulatory Comm'n*, 670 F.2d at 41-42 (finding a purchased gas adjustment clause is necessarily a part of a new rate filing, and thus subject to § 4 scrutiny, because it is "an integral part of the manner in which rates are charged").

CIG filed a rate increase under § 4, but the rate filing proposed no change in the minimum bill. The propriety of subjecting the minimum bill to review under § 4 requires a finding that the provision is integal to the rate structure of CIG. Both the ALJ and the Commission found that the bill is an essential part of the rate structure. We must uphold this factual finding if it is supported by substantial evidence. 15 U.S.C. § 717r(b); *Permian Basin Area Rate Cases*, 390 U.S. at 767, 88 S.Ct. at 1360.

The ALJ set forth the basis of this factual finding as follows:

> Inasmuch as the rates applicable to Natural under the F-1 and the H-1 Rate Schedules are volumetric rates, all fixed and variable costs previously allocated to Natural pursuant to the partially approved settlements are included in these one-part volumetric rates. CIG's Section 4 rate filing increased rate components included in the F-1 and H-1 Rate Schedules, and, accordingly, the charge flowing from implementation of the minimum bill provisions were also affected. To invoke the minimum bill provisions, CIG must turn to its F-1 and H-1 Rate Schedules as well as its service agreement to determine its charges to Natural.
>
> Hence, the proposed rate increase inflates the impact of the minimum bill provisions which are com-

> ponents of the entire rate design. Unlike other aspects of the longstanding service agreement which have no different impact upon a purchaser after a rate increase, the charges which can be collected under minimum bill provisions flex in tandem with a rate increase. Clearly, the minimum bill provisions are an integral part of the rate increase . . . .

25 F.E.R.C. ¶ 63,012 at 65,015.

As the ALJ found, CIG's rate increase elevated the impact of the minimum bill. Natural is CIG's second largest customer and purchases about 25% of the gas CIG sells. Thus, the minimum bill, which requires Natural to pay for 90% of its annual entitlement even if it takes no gas, guarantees a large and constant source of payment for CIG. This guaranteed payment has a major impact on CIG and its rate structure. The Commission's determination that the minimum bill is an integral aspect of the CIG rate structure and therefore is subject to § 4 review is supported by substantial evidence.

The Commission's suspension order in this proceeding specifically provided for retroactive refund. This order preserved the Commission's power to revise each integral provision of the rate structure, including the minimum bill provision, retroactively. *See Florida Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 741 F.2d at 1311. That the minimum bill issue was severed and dealt with separately from the remainder of the rate increase filing in no way eliminated or limited the Commission's authority to order refund. The Commission's authority was preserved as to each issue until the issue was resolved.

B.

Our consideration of the Commission's power to order the modification retroactively is complicated by the fact that, during the pendency of the § 4 proceeding, CIG and Natural entered into a new service agreement which was

accepted by the Commission pursuant to § 7 of the Natural Gas Act. The questions raised by these circumstances are (1) whether the Commission's suspension order applies to the new agreement between CIG and Natural, and (2) whether Commission acceptance of that agreement in the § 7 proceeding precludes the Commission from ordering retroactive modification of the minimum bill.

The minimum bill which was in effect at the time the Commission suspended the rate increase was superseded by an identical provision in the subsequent service agreement between CIG and Natural. The new agreement was executed three months after the Commission suspended the rate increase. Since the Commission may order retroactive refund only where a company's rates have been suspended pending § 4 review, *Moss v. Federal Power Comm'n*, 502 F.2d 461, 469 (D.C.Cir.1974), *rev'd on other grounds*, 424 U.S. 494, 96 S.Ct. 1003, 47 L.Ed.2d 186 (1978), and the new minimum bill provision was enacted after the Commission suspension, the question is raised whether the suspension order applies to the new minimum bill provision.

The new minimum bill provision is identical in all respects to the bill in the service agreement in existence when CIG filed its rate increase. The lone difference between the two service agreements is that the new agreement entitles Natural to a slightly greater quantity of gas. The new agreement and its minimum bill did not create a new contractual arrangement but rather extended their prior counterparts. The previous agreement and minimum bill were subject to the suspension order. Since the new bill merely extended the operation of the prior bill, the suspension order applied to the new provision and empowered the Commission to act upon it.

The Commission's issuance of a certificate of public convenience and necessity under § 7 authorizing CIG to

increase its sales to Natural had no effect on the Commission's § 4 refund power. While the § 4 rate proceeding progressed, CIG was involved concurrently in a proceeding under § 7 of the Natural Gas Act. In the § 7 proceeding, CIG sought the issuance of a certificate of public convenience and necessity authorizing a change in the entitlements of several of its customers. The lone change proposed by CIG concerning Natural involved a slight increase in Natural's annual entitlement. The Commission issued a certificate authorizing the changes requested by CIG. CIG and Natural then executed and filed the new service agreement which the Commission accepted. Refund conditions were not attached to the certificate or the acceptance of the new service agreement.

Proceedings under § 4 and proceedings under § 7 are separate and distinct. Proceedings under § 4 focus on whether a natural gas company's rates are just and reasonable. 15 U.S.C. § 717c(a); *see Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. at 612, 64 S.Ct. at 292. Proceedings under § 7, on the other hand, focus on whether actions proposed by a natural gas company are "required by the present or future public convenience and necessity" and whether the company "is able and willing properly to do the acts. . . ." 15 U.S.C. § 717f(e); *see Federal Power Comm'n v. Hunt*, 376 U.S. 515, 525, 84 S.Ct. 861, 867, 11 L.Ed.2d 878 (1964). In a § 7 proceeding, the Commission must consider whether a company has the financial and physical resources to perform a proposed act and how that act will affect the general public and the natural gas industry. *Id.*

Scrutiny of a company's rates and charges often is vital in determining whether proposed actions should be certificated as being in the public interest. *See Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. at 390-91, 79 S.Ct. at 1254-55. That determination, however, does not depend on a finding that the rates are just and reasonable. *Federal Power Comm'n v. Hunt*, 376 U.S. at 523-

24, 84 S.Ct. at 866-67; *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. at 390-91, 79 S.Ct. at 1254-55. "[A] section 7 proceeding is not to be equated with a proceeding under section 4 or section 5 to determine a just and reasonable rate." *Texaco, Inc. v. Federal Power Comm'n*, 290 F.2d 149, 157 (5th Cir.1961). The Commission had no duty to determine the justness of CIG's rate structure and minimum bill in the § 7 proceeding.

The sections 4 and 7 proceedings CIG initiated were independent. The foci of the proceedings differed; the factors the Commission considered in making its determinations differed. The § 7 orders did not preclude the Commission from retroactively modifying the minimum bill.

In summary, the minimum bill was subject to § 4 review as an integral part of CIG's rate structure, the Commission preserved its power to order refund in its suspension order, and the Commission's § 7 orders had no effect on its § 4 refund power. Therefore, we find that the Commission acted within its authority in ordering retroactive modification of CIG's minimum bill under § 4 of the Natural Gas Act.

II.

Also at issue in this appeal is whether the Commission properly rejected CIG's compliance filing modifying the minimum bill provision. The ALJ concluded that the minimum bill, which required Natural to pay both the fixed and variable costs of gas it did not take, was unreasonable and unjustified by the actual costs CIG incurred in providing service to Natural. He reasoned that CIG should be guaranteed recovery of the fixed costs it incurred in serving Natural. He therefore replaced the minimum bill with a demand charge designed to enable CIG to recover all fixed costs allocable to Natural.

The Commission's modification order affirmed the ALJ's finding that the minimum bill imposed by CIG was not

just and reasonable. The Commission, however, permitted CIG to retain the minimum bill but ordered CIG to revise it so as to preclude the collection of gas costs and other variable costs. The Commission made this revision retroactive to the effective date of CIG's rate increase. CIG sought rehearing only as to the propriety of ordering retrospective revision of the minimum bill. The Commission denied rehearing, and CIG filed revised rate schedules in an attempt to comply with the Commission's modification order. This filing (1) eliminated all variable costs from the minimum bill provision of the CIG-Natural service agreement, (2) listed the fixed cost component of rate schedules F-1 and H-1, and (3) modified the minimum bill so that deficiency charges incurred by Natural could be assessed at either the F-1 or the H-1 rate (depending under which schedule the deficiency arose) rather than at the lower F-1 rate at which all deficiencies had previously been assessed. The Commission rejected the filing because CIG's modification of the minimum bill to enable recovery of fixed costs at the higher H-1 rate was not permitted by the Commission's modification order. The Commission denied CIG's request for rehearing.

The initial question regarding this issue is whether CIG is jurisdictionally barred from seeking judicial review of the Commission's rejection of the compliance filing. CIG's appeal, though procedurally from the Commission rulings rejecting the compliance filing, actually challenges the scope of the Commission's modification order. CIG sought a rehearing within 30 days of the modification order and thus this appeal is not jurisdictionally defective. 15 U.S.C. 717r(a); *Distrigas Corp. v. Federal Energy Regulatory Comm'n*, 608 F.2d 25, 27 (1st Cir.1979) (per curiam). However, in its request for rehearing CIG objected only to making the minimum bill modification effective retroactively; CIG did not question the scope of the Commission's modification order. CIG's

failure to raise this specific challenge in its application for rehearing thus presents a question of waiver.

Courts of appeals generally will not consider an objection to an order of the Commission unless that objection was urged by the aggrieved person in his application for rehearing. 15 U.S.C. § 717r(b); *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-99, 75 S.Ct. 467, 470-71, 99 L.Ed. 583 (1955). Failure to raise an objection in one's application for rehearing waives the objection unless there is a reasonable ground excusing the failure below. *Id.; e.g., Atlantic Richfield Co. v. Federal Power Comm'n*, 585 F.2d 943, 946 (9th Cir.1978).

The circumstances of this case present such a reasonable ground. The Commission's modification order specifically required CIG to amend its minimum bill to eliminate the collection of variable costs. The order did not specifically permit CIG to modify the minimum bill to allow fixed cost recovery at the higher H-1 rate. The broad language used by the Commission in the order, however, raised the possibility of Commission approval of a minimum bill that would recover *all* fixed costs allocable to Natural. Full recovery of these fixed costs could be had only if deficiencies under the H-1 rate schedule could be assessed under the minimum bill at the H-1 rate. The Commission's rather loose language left it unclear whether CIG could incorporate its higher H-1 rate in its modified minimum bill.

This ambiguity excuses CIG's failure to question the scope of the ordered modifications in its application for rehearing following the modification order. It was not until the Commission rejected CIG's compliance filing that the company knew inclusion of the H-1 rate in the minimum bill would not be allowed. CIG did not know that it was aggrieved by the Commission's modification order until the Commission rejected its compliance filing. Since CIG was unaware it was aggrieved, CIG has not waived its right to raise this objection. *Cf. Midwestern*

Gas Transmission Co. v. Federal Energy Regulatory Comm'n, 734 F.2d 828, 832 (D.C.Cir.1984) (when a Commission order clearly aggrieves a person, failure to request a rehearing within 30 days bars judicial review).

The question on the merits is how to resolve the ambiguity in the Commission's order. An agency's interpretation of its own order is entitled to great weight. *Amoco Production Co. v. Federal Power Comm'n*, 491 F.2d 916, 921 (10th Cir. 1973) (citing *Permian Basin*, 390 U.S. at 767, 88 S.Ct. at 1360). When an agency order is ambiguous, a court will uphold the agency's interpretation unless it is arbitrary and capricious. *Chesapeake & O. Ry. Co. v. United States*, 571 F.2d 1190, 1194 (D.C.Cir.1977). Under this standard, we must uphold the Commission's interpretation of its modification order.

First, the Commission rejected the ALJ's use of a demand charge. The demand charge, if implemented, would have allowed CIG to recover all of its fixed costs regardless of the amount of gas Natural purchased. A minimum bill assessing F-1 deficiencies at the F-1 rate and H-1 deficiencies at the H-1 rate likewise would have insured CIG full fixed cost recovery. It is reasonable to assume the Commission intended that CIG's fixed cost recovery under the modified minimum bill would differ from the fixed cost recovery under the disapproved demand charge. Requiring CIG to continue to assess all deficiencies at the F-1 rate would result in a different fixed cost recovery than under the demand charge.

Furthermore, in its modification order the Commission expressed concern that guaranteed recovery of fixed costs might lessen CIG's incentive to increase sales to Natural or make its operations more efficient. Guaranteeing full fixed cost recovery, as CIG's interpretation of the modification order would do, is inconsistent with this concern. The Commission's interpretation of the order en-

courages CIG to sell gas to Natural because by doing so CIG can recover its H-1 fixed costs.

Finally, in its modification order the Commission deferred investigation of the proper level of fixed cost recovery under the minimum bill until CIG's next rate filing. It is consistent with this deferral to assume the Commission intended its minimum bill modification would eliminate the collection of variable costs but would leave the basic take or pay mechanism intact. Continued exclusive use of the F-1 rate is consistent with this assumption.

In light of the considerations detailed above, the Commission's interpretation of its modification order is reasonable. The Commission's determination that the minimum bill should not provide CIG with full fixed cost recovery is rational supported by substantial competent evidence. The Commission acted within its authority in rejecting CIG's compliance filing.

AFFIRMED.

APPENDIX B

MAY TERM

July 2, 1986

Nos. 84-2286 & 85-1171

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NATURAL GAS PIPELINE COMPANY OF AMERICA; THE PEOPLES GAS LIGHT AND COKE COMPANY, and NORTH SHORE GAS COMPANY; PUBLIC SERVICE COMPANY OF COLORADO; WESTERN GAS SUPPLY COMPANY and CHEYENNE LIGHT, FUEL AND POWER COMPANY; THE CITY AND COUNTY OF DENVER, COLORADO; K N ENERGY, INC.; MIGC, INC.; and THE CITY OF COLORADO SPRINGS, COLORADO,
Intervenors.

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc in the captioned causes.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX C

COLORADO INTERSTATE GAS COMPANY

Docket No. RP82-54-000

ORDER AFFIRMING INITIAL DECISION IN PART AND REVERSING INITIAL DECISION IN PART

(Issued May 25, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

In this proceeding we are considering whether the minimum bill commodity provision in Colorado Interstate Gas Company's (CIG) tariffs governing natural gas sales to Natural Gas Pipeline Company of America is just and reasonable. All other issues in the proceeding have been settled.[1] The administrative law judge issued an initial decision on the contested issue in which he found that CIG had not shown the minimum bill provision to be just and reasonable and, therefore, the provision was without force and effect. He also directed CIG to institute a monthly demand charge to Natural which would recover 100 percent of the fixed costs allocated to Natural. Except as is discussed below, we agree with his decision and affirm and adopt it.

The minimum annual bill provides that Natural must pay the full commodity charge on a minimum of 90 percent of its contract quantity even if it actually takes less than that amount. The commodity charge recovers both fixed and variable costs. Natural has no right to make

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[1] Our order accepting the settlement appears at 22 FERC ¶ 61,330.

up gas volumes it fails to take but for which it must pay the minimum bill charge. It is the only customer on CIG's system subject to a minimum annual bill.

While we agree with the judge that CIG failed to justify its minimum annual bill,[2] we believe some amplification of his decision is in order. In the first place, we wish to emphasize that our decision does not rest solely on the ground that CIG failed to meet its burden of proof. There is ample evidence in the record demonstrating that CIG's minimum bill is not just and reasonable. The judge clearly delineated this evidence in the initial decision, and we need not reiterate it here.[3]

Also, our conclusion that CIG's minimum bill to Natural is not just and reasonably does not mean that CIG may not employ a minimum bill in serving that customer. In *Atlantic Seaboard Corp.*, 38 FPC 91 (1967) we identified three ratemaking functions, any one of which could justify a minimum commodity bill. These are: (1) the recovery of that portion of a pipeline's rates

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[2] The judge, while finding in its initial decision that CIG's minimum bill was not just and reasonable, concluded that there was insufficient evidence in the record to conclude that the minimum bill was anticompetitive or unduly discriminatory. Natural did not take exception to these conclusions. However, in Natural's brief opposing exceptions, it states that the minimum bill is not just and reasonable because of its anticompetitive and discriminatory effects. CIG has moved to strike those portions of Natural's brief opposing exceptions relating to those two arguments because they were not raised in Natural's brief on exceptions. We gave no weight to these arguments in reaching our decision. Accordingly, we take no action on the motion to strike.

[3] CIG presented no evidence at the hearing. It requests that, if we find that it has the burden of proof and that it has not met that burden, we reopen the record to permit CIG to present evidence on the minimum bill. CIG's request is denied. Whether CIG bore the burden of proof or not, it had ample opportunity to present evidence. Its failure to do so was at its peril. Remanding the case for a further evidentiary hearing would needlessly delay resolution of the proceeding and would be unfair to other parties.

which allocate fixed charges to the commodity portion, (2) the protection of customers with no alternative supply from having to bear the cost of facilities constructed for a customer which obtains an alternative source, and (3) the minimum take-or-pay obligation which a pipeline has to its suppliers. Here, CIG's minimum bill collects the fixed cost portion of its commodity charge as well as variable costs. We believe that a minimum commodity bill limited to recovery of the pipeline's fixed costs would be just and reasonable.

The judge recognized that, due to CIG's dependence on Natural as a major customer, there was a reasonable basis for applying a minimum bill to Natural. We agree with this conclusion. However, rather than formulating a just and reasonable minimum bill to be applied, he directed CIG to impose a demand charge which would recover 100 percent of fixed costs from the customer. We disagree with this remedy. Such a charge is not the most appropriate means of assuring that CIG recovers all fixed costs which have been allocated to Natural.

In our view, this goal can be better achieved simply by eliminating variable costs from the minimum bill. This would give CIG an inducement to maintain or increase its sales to Natural above the contract minimum because CIG could charge the full volumetric rate, including fixed and variable costs, on all gas sold above the contract minimum. And fixed costs include return on equity. The demand charge proposed by the judge, on the other hand, provides no such incentive because it would enable CIG to recover all fixed costs, including full return on equity, allocated to Natural regardless of the amount of gas Natural purchased. Accordingly, we will require CIG to amend the minimum bill provision of its tariff to Natural to eliminate all variable costs from the minimum bill.

We note that the question of whether CIG's minimum bill should be predicated on Natural taking 90 percent

of its minimum contract quantity has not been addressed in this proceeding. The record is not sufficient for us to determine whether the 90 percent figure is just and reasonable. We are concerned, however, because CIG's rates in this docket are designed so CIG will recover 100 percent of its fixed costs if Natural takes 90 percent of its contract quantity. This means that the minimum bill will enable CIG to recover 100 percent of its fixed costs allocated to Natural from that company. It isn't clear whether guaranteed full fixed cost recovery provides sufficient incentives for efficiency. We believe this matter should be investigated in CIG's next rate case. Accordingly, we direct the staff to consider the proper level of fixed cost recovery for CIG's minimum commodity bill in CIG's next section 4 rate case.

This leaves the question of whether our disposition of the minimum bill issue should be prospective or retrospective. We believe it should be retrospective. In our order accepting the partial settlement in this case, we required CIG to file revised tariff sheets and to make refunds based on those tariff sheets. However, we expressly noted that the minimum bill issue had been severed and that the order was without prejudice to any finding or order we might make subsequently in this or any other proceeding concerning CIG. So, CIG's rates are still subject to refund insofar as the minimum commodity bill is concerned. And therefore, relief from CIG's unjust and unreasonable minimum bill can be retrospective.

The Commission today is issuing a final rule on minimum bills in Docket No. RM83-71-000 which would require all pipelines to eliminate variable costs from their minimum commodity bill. Our decision in this case is fully consistent with the rule issued.

The Commission orders:

(1) The initial decision issued on October 18, 1983, in this proceeding is affirmed to the extent it is consistent with the order.

(2) Within 75 days of the date hereof, CIG shall modify the minimum bill provisions of its H-1 and F-1 rate schedules to eliminate collection of the variable cost competent of the commodity charge.

(3) Within 30 days of the Commission's approval of CIG's amended tariff, CIG shall refund all amounts collected under its present minimum bill in excess of the level approved herein with interest determined in accordance with § 154.67(d) of the Commission's Rules and Regulations (18 C.F.R. § 154.67(d). Within 15 days thereafter, CIG shall file a report with the Commission showing the computation of the refunds and interest paid.

Docket No. RP82-54-011

COLORADO INTERSTATE GAS COMPANY

ORDER DENYING REHEARING

(Issued July 23, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa and Oliver G. Richardson III.

In an order issued on May 25, 1984 [27 FERC ¶ 61,315], we found that the minimum bill provision in Colorado Interstate Gas Company's (CIG) tariff under which it serves Natural Gas Company of America was not just and reasonable. The tariff provided that Natural must pay the full commodity charge on a minimum of 90 percent of its contract quantity even if it actually takes less than that amount. The commodity charge recovers both fixed and variable costs. We directed CIG to modify its minimum bill to Natural to eliminate collection of the variable cost component of the commodity charge. We also ordered that this modification should be made retrospective to the time CIG's rates in this docket became effective. CIG accepts our decision insofar as we directed the pipeline to modify its minimum bill. But it seeks rehearing of the requirement that its minimum bill be modified retrospectively. We deny rehearing.

Essentially CIG argues that the Commission erred in examining the minimum bill provision under section 4 [1]

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[1] Section 4 of the NGA requires all rates charged by a natural gas company to be just and reasonable. It also requires natural gas companies to file tariffs with the Commission showing the rates they

of the Natural Gas Act (NGA). Instead, according to CIG, the Commission should have reviewed the tariff under section 5,[2] where it is prohibited from modifying the tariff retrospectively. CIG's argument rests on the ground that the service agreement containing the minimum bill provision was accepted by the Commission, without suspension or refund obligation, after CIG filed for increased rates in this proceeding. And, the Commission's action in accepting the service agreement, including the minimum bill, negated the Commission's section 4 authority over the minimum bill. The critical procedural history cited by CIG is this: CIG filed a general rate increase in this docket on March 29, 1982. On April 28, 1982 [19 FERC ¶ 61,071], the Commission suspended the increase until September 29, 1982. A partial settlement was then accepted by the Commission on March 10, 1983 [22 FERC ¶ 61,330], which settled all issues but that of the minimum bill. However, the proposed tariff sheets filed by CIG on March 29, 1982, did not include the minimum bill provision. The minimum bill was contained in a service agreement between CIG and Natural which was executed on July 27, 1982, and which was accepted by the Commission to become effec-

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charge. The Commission, whenever a tariff is filed, is authorized to investigate the lawfulness of the rates contained in the tariff and to suspend the operation of the tariff for a period not to exceed five months. Upon completion of the investigation, the Commission may prescribe just and reasonable rates which become effective retroactive to the time the suspension period expired. The Commission may also order the natural gas company to refund, with interest, that portion of the filed rates charged by the company after the suspension period expired which the Commission found was not justified.

[2] Section 5 of the NGA provides that, whenever the Commission, after a hearing had upon its own motion or upon complaint, finds a rate to be unjust or unreasonable, it may determine the just and reasonable rate "to be thereafter observed". Thus, under section 5, rates established by the Commission became effective prospectively only.

tive on September 29, 1982. The service agreement was not suspended, and no refund conditions were attached to it.

We reject CIG's argument. The extent to which the Commission has section 4 authority to review CIG's minimum bill was considered by the administrative law judge when he ruled on the question of whether CIG or Natural had the burden of proof in this proceeding. We adopted his ruling in our May 25, 1984 order, and we believe the reasoning he used is applicable here. Essentially, the Commission has authority to review an existing rate practice in a section 4 proceeding when the existing practice is an integral part of the manner in which the rate is charged. *See, Laclede Gas Co. v. F.E.R.C.*, 670 F.2d 38 (5th Cir. 1982); *Cities of Batavia v. F.E.R.C.*, 672 F.2d 64 (D.C. Cir. 1982); *North Penn Gas Co. v. F.E.R.C.*, 707 F.2d 763 (3rd Cir. 1983). In our view, CIG's minimum bill provision clearly meets this test. A provision which requires a purchaser to pay for gas whether or not it is taken is integral to a determination of whether the overall revenue level is just and reasonable.

Thus, to this point, there is no question that we have authority to review CIG's minimum bill under section 4 of the NGA. And, if we find the minimum bill to be unjust and unreasonable, we may order CIG to refund, with interest, all revenues collected under the minimum bill, retroactive to the time CIG's rates in this proceeding became effective.

The issue then becomes whether our acceptance, without suspension or refund obligation, of the minimum bill clause in CIG's service agreement, after we suspended CIG's general rate increase, dissolves our authority. It does not. The service agreement which CIG executed on July 27, 1982, and which the Commission accepted, was the culmination of an application CIG filed, on

March 31, 1981, in Docket No. CP81-260-000, for a certificate of public convenience and necessity under section 7(c) of the NGA for authorization to increase its service to Natural and other customers. We issued the requested certificate to CIG on June 24, 1982, and directed the pipeline to file amended service agreements reflecting the new service.

Neither CIG's application nor the certificate we issued dealt with the question of a minimum bill. CIG's minimum bill was not an issue in the proceeding. The focus of our attention was whether the new service requested by CIG was in the public convenience and necessity. The service agreement CIG and Natural executed on July 27, 1982, merely carried forward the minimum bill clause contained in the previous service agreement between the two. Under these circumstances, our acceptance of the service agreement cannot be taken as an acceptance of the minimum bill clause as just and reasonable under section 4 of the NGA. We were merely acting to permit Northern to implement its new service.

The Commission orders:

CIG's application for rehearing is denied.

APPENDIX D

15 U.S.C. § 717c:

Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.

Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any

amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

15 U.S.C. § 717d:

Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Com-

mission may order a decrease where existing rates are unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.